

CONFIDENTIALITY AND PRIVILEGED COMMUNICATION

MCL 330.1748

MCL 330.1750

CONFIDENTIALITY

I. WHAT IS CONFIDENTIAL INFORMATION?

A. Information in the record of a recipient and other information acquired in the course of providing mental health services to a recipient. (MCL 330.1748)

B. This information is not open to public inspection and may be disclosed outside of the CMHSP or contract provider only as allowed by MCL 330.1748 or MCL 330.1748a.

C. Attorney General Opinion 5709, 5/20/1980, Frank Kelley, A. G.

“...it is my opinion that a county community mental health board may obtain information concerning specific recipients from private or public agencies with which it has contracted to provide mental health services to recipients, where such information is sought for a purpose germane to the county community mental health program, without the consent of the recipient.”

“...it is also my opinion that a county community mental health board may require the service providers with which it contracts to share information regarding recipients, so long as the information is germane to the provision of mental health services...provided that such information is not disseminated outside the county mental health program.”

II. MANDATORY DISCLOSURES - When requested, confidential information must be disclosed in the following situations:

A. Case record entries made after March 28, 1996 when requested by an adult competent recipient

No discretionary withholding based upon determination of detriment

B. Pursuant to an order or subpoena of a court of record or a subpoena of the legislature, unless information is privileged by law

Michigan Court Rules require, in most cases, a release to accompany a subpoena from a court of record

- C. To a prosecuting attorney as necessary for him/her to participate in a proceeding governed by this act (civil commitment example)
- D. To an attorney for the recipient with the consent of the recipient, guardian with the authority to consent, or parent/legal guardian of a minor recipient
- E. If necessary to comply with another provision of law
- F. To MDCH if necessary for it to discharge a responsibility placed upon it by law
- G. To the Office of the Auditor General in order for it to discharge its Constitutional responsibilities
- H. To a surviving spouse of the recipient, or if no spouse, to the individual most closely related to the recipient within the 3rd level of consanguinity for the purpose of applying for or receiving benefits but only if that person has been appointed personal representative of the recipient's estate

III. DISCRETIONARY DISCLOSURE WITH CONSENT

Except as provided by II.A. above (i.e. no discretionary withholding of case record entries after 3/28/96) if consent is obtained from the recipient, guardian with authority to consent, parent with legal custody of a minor recipient, or the court appointed representative or executor of the estate of a deceased recipient, information may be disclosed to the following:

- A. A mental health service provider for the recipient
- B. To the recipient or his or her guardian or the parent of a minor recipient or another individual or agency unless in the *written judgment of the holder of the record the disclosure would be detrimental to the recipient or others*

This is the "discretionary" part

IV. DISCRETIONARY DISCLOSURE WITHOUT CONSENT

Information may be disclosed at the discretion of the holder without the consent of the recipient/guardian/parent under 1 or more of the following circumstances:

- A. As necessary for the recipient to apply for and receive benefits if those benefits would accrue to the provider for payment for services (Medicaid, Social Security examples)

- B. As necessary for the purpose of outside research, evaluation, accreditation or statistical compilation

Recipient shall not be identified unless

1. Essential in order to achieve the purpose for which the information is sought, **or**
2. Clearly impracticable to prevent the identification

BUT, in neither situation if the recipient is likely to be harmed by the identification

- C. To a provider of mental health or other health services or a public agency, if there is a compelling need to disclose based upon a substantial probability of harm to the recipient or others

- V. Disclosure to Michigan Protection and Advocacy Services controlled by federal law

- VI. MCL 330.1748a – Child abuse or neglect investigations

- A. If compelling need for mental health records or information to determine whether child abuse or neglect has occurred or to take action to protect a minor where there may be a substantial risk of harm, a DHS caseworker or administrator directly involved in the CPS investigation must notify a mental health professional that an investigation is being conducted involving a person who has received services from the mental health professional (could be victim, perpetrator, siblings, etc.) and must submit written request for mental health records and information pertinent to the investigation.

1. Upon receipt of the notice and request, the mental health professional must review all mental health records and information in the mental health professional's possession to determine if there is information that is pertinent to the investigation
2. Information must be released within 14 days from receipt of the request
3. Privileges do not apply to mental health records or information to which access is given under this section

PRIVILEGED COMMUNICATIONS

I. WHAT ARE PRIVILEGED COMMUNICATIONS?

- A. Communication made by a patient to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment (MCL 330.1750), **or**
- B. A communication made privileged under applicable state or federal law:
Examples
 - 1. Licensed master's level social worker – client
 - 2. Licensed professional counselor – client
 - 3. Marriage and family therapist – client

II. GENERAL PROHIBITION

- A. Privileged communications shall not be disclosed in civil, criminal, legislative or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege.
- B. Exceptions: Privileged communications shall be disclosed:
 - 1. If communication relevant to a physical or medical condition of the patient that the patient has brought into the civil or administrative case or proceeding as a claim or defense

Also, after the death of the patient, a physical or mental condition of the patient has been introduced as an element of the patient's claim or defense by a party to a civil or administrative case or proceeding
 - 2. If the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, **but only** if the patient was informed that any communications could be used in the proceeding. (civil commitment, example)
 - 3. If the privileged communication is relevant to a matter under consideration in a proceeding to determine the legal competence of the patient or the patient's need for a guardian

but only if the patient was informed that any communications made could be used in such a proceeding.

4. In a civil action by or on behalf of the patient or a criminal action arising from the treatment of the patient against the mental health professional for malpractice.
5. If the privileged communication was made during an examination ordered by a court, **prior to which** the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered. (child custody proceedings, example)
6. If the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, **but only with respect** to issues to be determined in proceedings concerned with the competence of the patient to stand trial.
7. In a proceeding in which Sections A and B prohibit disclosure of a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, the fact that the patient has been examined or treated or undergone a diagnosis also shall not be disclosed unless that fact is relevant to a determination by a health care insurer, health care corporation, nonprofit dental care corporation, or health maintenance organization of its rights and liabilities under a policy, contract, or certificate of insurance or health care benefits.

III. DUTY TO WARN, MCL 330.1946

- A. It is an exception to the prohibition regarding disclosure of privileged communications between a mental health professional and an individual
- B. Who is a “mental health professional” to whom this duty accrues?
Mental health professional defined as an individual trained and experienced in the area of mental illness or developmental disability and who is 1 of the following:
 1. Physician
 2. Licensed psychologist
 3. Registered nurse

4. Licensed professional counselor
5. Licensed marriage and family therapist
6. Licensed master's social worker

C. When does the duty arise?

1. When a patient communicates to a mental health professional who is treating the patient a threat of physical violence –
 - a. Against a reasonably identifiable 3rd person, and
 - b. The patient has the apparent intent and ability to carry out that threat, and
 - c. The intent to carry out that threat is in the reasonably foreseeable future.

D. What is the duty?

The mental health professional has the duty to take action as described in subsection E.

E. The duty is discharged if the mental health professional, after the threat, does 1 or more of the following in a timely manner:

1. Hospitalizes the patient or initiates proceedings to hospitalize the patient under Mental Health Code Chapter 4 (adults) or 4a (minors)
2. Make reasonable attempts to notify 3rd party of the threat and notify local police department, county sheriff or state police of the threat

If 3rd party is a minor, notify DHS CPS and the minor's custodial parent, non-custodial parent or legal guardian, whoever is appropriate in the best interests of the minor.

IV. REPORTS TO CHILDREN'S PROTECTIVE SERVICES

A. **Child Protection Law, MCL 722.622 Definitions.**

(f) "Child abuse" means harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal

guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy

B. Child Protection Law, MCL 722.623 Sec. 3

(1) An individual is required to report under this act as follows:

(a) A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker, registered social service technician, social service technician, a person employed in a professional capacity in any office of the friend of the court, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act. If the reporting person is a member of the staff of a hospital, agency, or school, the reporting person shall notify the person in charge of the hospital, agency, or school of his or her finding and that the report has been made, and shall make a copy of the written report available to the person in charge. A notification to the person in charge of a hospital, agency, or school does not relieve the member of the staff of the hospital, agency, or school of the obligation of reporting to the department as required by this section. One report from a hospital, agency, or school is adequate to meet the reporting requirement. A member of the staff of a hospital, agency, or school shall not be dismissed or otherwise penalized for making a report required by this act or for cooperating in an investigation.

(6)... if the allegation, written report, or subsequent investigation indicates that the suspected child abuse or child neglect was committed by an individual who is not a person responsible for the child's health or welfare, including, but not limited to, a member of the clergy, a teacher, or a teacher's aide, the department shall transmit a copy of the allegation or written report and the results of any investigation to a law enforcement agency in the county in which the incident occurred.

(7) If a local law enforcement agency receives an allegation or written report of suspected child abuse or child neglect or discovers evidence of or receives a report of an individual allowing a child to be exposed to or to have contact with methamphetamine production, and the allegation, written report, or subsequent investigation indicates that the child abuse or child neglect or allowing a child to be exposed to or to have contact with

methamphetamine production, was committed by a person responsible for the child's health or welfare, the local law enforcement agency shall refer the allegation or provide a copy of the written report and the results of any investigation to the county department of the county in which the abused or neglected child is found, as required by subsection (1)(a)

B. MCL 722.624 Persons permitted to report child abuse or neglect.

In addition to those persons required to report child abuse or neglect under section 3, any person, including a child, who has reasonable cause to suspect child abuse or neglect may report the matter to the department or a law enforcement agency.

C. MCL 722.631 Privileged communications.

Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under section 3 if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under section 3.

D. 722.632 Report to law enforcement officials or probate court.

This act shall not prohibit a person who has reasonable cause to suspect child abuse or neglect from making a report to the appropriate law enforcement officials or probate court.

E. Attorney General Opinion No. 6934, March 19, 1997, Kelly, AG (EXCERPTS)

CHILD PROTECTION LAW:

MENTAL HEALTH CODE:

Duty of community mental health professional to report child abuse

Section 3 of the Child Protection Law does not impose a duty on a community mental health professional to report child abuse when an adult recipient of community mental health services discloses that he or she was abused as a child or when an adult recipient discloses having abused a

child, who is now an adult, unless there is reasonable cause to suspect that there is a threat of harm to a child.

In section 2(c) of the Child Protection Law "[c]hild abuse" is defined as follows:

[H]arm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare, or by a teacher or teacher's aide, that occurs through nonaccidental physical or mental injury; sexual abuse; sexual exploitation; or maltreatment.

Under section 2(b) of the same law a "[c]hild" means a person under 18 years of age."

Based on its title, the Child Protection Law was passed to protect children, not adults, from abuse. This is confirmed by the plain language of the statute. Section 3(2) of the Child Protection Law requires that the written report of child abuse contain "the name of the *child*," the names of "the *child's* parents, the *child's* guardian, the persons with whom the *child* resides, and the *child's* age." (Emphasis added.)

While section 3 of the Child Protection Law ordinarily does not impose a duty on a community mental health professional to report child abuse when an adult recipient of community mental health services discloses that he or she was abused as a child or when an adult recipient discloses having abused a child, who is now an adult, there are two exceptions to this rule. First, if an adult recipient discloses having been abused as a child, and that abuser is now responsible for another child's health or welfare, the factual circumstances disclosed may trigger the reporting requirements under sections 2(c) and 3 of the Child Protection law if they provide reasonable cause to suspect a threat of harm exists to that other child. Second, if an adult recipient discloses having abused a child, who is now an adult, but that recipient is now responsible for another child's health or welfare, the factual circumstances may trigger the reporting requirements under sections 2(c) and 3 of the Child Protection Law if they provide reasonable cause to suspect a threat of harm exists to that other child.